a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(e) **Termination.** Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(10) **Hearing by Panel of Three Commissioners.** After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(11) **Dismissal of Complaint.** If the panel finds that the complaint or evidence is insufficient, the panel shall make its certified report of the proceedings and recommendations to the Board of Commissioners which shall review the proceedings, and shall dismiss the complaint, or refer the matter back to the panel for further hearing or the administering of the proceedings before the

panel. The Secretary of the Board of Commissioners shall give notice of a dismissal to the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county or counties in which the Respondent resides and maintains his office, and of the county or counties from which the complaint arose.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(12) **Private Reprimand; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(13) **Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) Show Cause Order Issued by the Court to Respondent. On the filing of such final report of the Board of

Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(18) Answer Briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order. After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar

association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

(20) **Proceedings Private; Exceptions.** All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) Where the respondent shall request in writing that they be public, or

(b) Where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(21) Petition for Reinstatement. No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) Contents of Petition for Reinstatement. Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possess all of the qualifications, mental, educational and moral which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

(23) Costs to Be Deposited with Petition for Reinstatement. Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence that he possess all of the qualifications, mental educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule XVII shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) Petition for Reinstatement Referred to Board of Commissioners. Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of

Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court from Denial of Petition by Board of Commissioners. The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section 22(c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the

final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(27) Manner of Service of Notices, etc. Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) Quorum of Panel or Board. A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) Clerk Is Agent for Service of Notices on Nonresident Attorney. Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk

of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

(30) Manner of Service on Clerk; Record of Such Service Not a Public Record. All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) Power to Issue Subpoenas. In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Com-

missioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any subcommittee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(32) May Order Depositions. The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) Effect of Refusal to Testify. The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(35) Docket of Complaints. The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) Board May Prescribe Rules. The Board of Commissioners may, subject to the prior approval of this Court,

adopt other rules and regulations not inconsistent herewith.

(37) Rule to Be Liberally Construed. The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatements shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule became effective shall continue to apply.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-1258

GEORGE S. HEITZLER, JR.
Petitioner,

v.

CINCINNATI BAR ASSOCIATION,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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May 4, 1973

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PETITIONER'S REPLY MEMORANDUM

At page 1 and 2 of the brief filed by the Cincinnati Bar Association, in that portion of the brief that is supposed to contain the "statutory provisions involved," S. Ct. Rule 23 (d), the following *argument* appears:

> "At the time that the complaint in this matter was filed Rule XVIII was in effect and not Gov. Rule V as set forth in the petition. *** Rule XVIII is a well thought out, . . . rule . . . . Its efficacy should not be disturbed in any manner by this court."

This statement would tend to indicate that Petitioner has cited the wrong rule. The same assertion is made in Respondents' Brief, at page 10. Petitioner has cited

the correct rule. The precedessor to Rule V was in fact Rule XVIII, which dealt with the disciplining of attorneys and which was in effect when the complaint was filed (August 11, 1971); however as of February 28, 1972, the Supreme Court of Ohio renumbered the rules and Rule XVIII became Rule V. They are virtually verbatim.

Rule XVIII became Rule V dealing with the disciplining of attorneys. Rule XXI became Rule VI dealing with the sole and exclusive method of removing judges, all pursuant to the legislative mandate of the Ohio legislature. O.R.C. 2701.11 and 2701.12.

Whether we say Heitzler was improperly removed pursuant to Rule XVIII, now Rule V, dealing with attorneys, instead of being removed as a judge pursuant to the exclusive provisions of Rule XXI, now Rule VI, and O.R.C. 2701.11 and 2701.12, is a distinction without difference. He plainly was removed under the wrong rule. Due process of law demands removal if at all, under the right rule, which in this case was the Rule relating to judges, Rule XXI, now Rule VI.

Reference is respectfully made to Argument IV, pages 35-43 of the Petition where the *entire* problem presented by the improper removal proceedings is discussed.

At page 7 of its brief, the Cincinnati Bar Association levels an unwarranted attack upon counsel for the Petitioner that cannot go unanswered.

Petitioner at p. 30, N. 9 of the Petition argues that the Ohio disciplinary procedures for lawyers and

judges needs to be reviewed by the Supreme Court of the United States because the Ohio Supreme Court has just refused to reinstate John Ruffalo notwithstanding the decision of this Honorable Court in *In re Ruffalo*, 390 U.S. 544 (1964). This, cries the Cincinnati Bar Association, is an "audacious statement." In their brief they then boldly state that:

> "The state court proceedings [in *Ruffalo*] were never the subject of orders by this court. To make such a careless statement not only impugns the integrity of the Supreme Court of Ohio but is obviously a deliberate attempt on the part of petitioner to mislead this court." (Brief in Opposition, p. 7)

Counsel for the Cincinnati Bar Association apparently did not read Mr. Justice Douglas' statement in *Re Ruffalo* at 390 U.S. 544, 550 where he stated:

> "Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here *is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.'* Selling v. Radford, 243 U.S. 46, 61 L. Ed. 585, 587, 37 S. Ct. 377." (Emphasis added.)

The Cincinnati Bar Association likewise completely misread the holding of this Honorable Court: viz that Ruffalo had no notice that the additional charge would be leveled against him until *after* he had given testimony in the *state* proceedings. Mr. Justice Douglas concluded at 390 U.S. 544, 551, 552:

> "How the charge would have been met had it been originally included in those leveled against

petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

Therefore a careful reader concludes that the state court proceedings were so infected with a lack of procedural due process that no federal disbarment could follow. Despite this clear and concise pronouncement from the Highest Court of this country, the Supreme Court of Ohio has denied the petition for reinstatement filed by John Ruffalo. Petition, p. 30, N. 9.

Petitioner again asserts that "the disciplinary procedures for lawyers and judges in the State of Ohio needs to be reviewed by this Honorable Court."

At page 8 of its brief, the Cincinnati Bar Association makes the rather startling admission that:

"Nowhere in the rules of procedure of the Supreme Court [of Ohio] are there any provisions wherein the petitioner must be given the right to attack the findings of fact and recommendations of a hearing board [sic! should be hearing *panel*] prior to the filing of the recommendations with the Supreme Court of Ohio." (Emphsis added.)

Petitioner submits that the above-quoted provision is a clear cut admission of the obvious and utter lack of procedural due process infecting all Ohio disciplinary proceedings.

The logical outcome arising from the Cincinnati Bar Association argument is that the Bar Associations in Ohio are free to dredge up whatever charges they choose, file them, and after hearings, the 3-man Hearing Panel *and then* the 17-man Board of Commissioners have untrammeled freedom to make whatever factual findings and recommendations they choose, all without notice, hearing or objections by a judge. The unfortunate judge is "sidelined" while all the crucial factual findings and recommendations are made, and then, and only then, is the unfortunate judge first allowed to object.

Procedural due process demands far more. See the Petition, pp. 30-34.

At page 10 of its brief, the Cincinnati Bar Association seems to say that Petition via his counsel agreed and voiced no objection to proceeding under Rule XVIII (now Rule V) rather than Rule XXI (now Rule VI). Thereafter on p. 12 of the brief the Bar Association cites *Forsyth* v. *Hammond*, 166 U.S. 506 (1897) for the proposition that where both parties have appeared in a case and participated in it, the issue of jurisdiction may not be questioned. *Such an assertion is decidedly wrong.* First, this Honorable Court has unequivocally held that neither the failure to object nor the consent of the parties to a suit can confer *subject matter jurisdiction* on a court. See eg: *Metcalf* v. *City of Watertown*, 128 U.S. 586 (1888). Exactly that issue is presented here. There is little question that the *personal jurisdiction* over Heitzler was effective since he filed an answer. However, if he was removed from office pursuant to the wrong rule, then this clearly deals with subject matter jurisdiction.

Second, the Bar Association's reliance upon *Forsyth* v. *Hammond*, 166 U.S. 506 (1897) is completely misplaced. The precise issue there dealt with an attempt to collaterally review city annexation proceedings in the federal courts when in fact the state's highest court had already rendered a final decision upholding the annexation. However, the Seventh Circuit ruled that the annexation was invalid. A clear conflict between the decision of the Indiana Supreme Court and the Seventh Circuit Court of Appeals was presented.

The plaintiff, Forsyth, had participated in the state proceedings including the appeal to the Indiana Supreme Court. Justice Butler ultimately ordered the suit dismissed, and at 166 U.S. 506, 517 asked,

> "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal acting independently, and having no appellate jurisdiction?"

No independent forum is involved in the case at bar. No collateral review is sought. No problems of *res judicata* are involved. This Honorable Court, should it grant Certiorari, unquestionably has the power to review the disciplinary decision of the Supreme Court of Ohio. The reliance on *Forsyth* by the Bar Association is clearly wrong.

At page 11 of their brief, the Cincinnati Bar Association seems to say that the Amendment to Art. IV, Section 2 of the Ohio Constitution justifies the removal of a *judge* under disciplinary procedures for *attorneys* for alleged violations of Canons of *Judicial* Ethics.

Neither the language of the amendment, nor due process of law sustain such an untenable position.

Petitioner does not challenge the power of the highest court of any state to conduct appropriate disciplinary proceedings according to appropriate procedures. We do respectfully submit that where a well defined, precise and exclusive procedure is provided first by the legislature of the State of Ohio, O.R.C. 2701.11 and 2701.12, and later by rule of the Supreme Court itself, (Rule XXI, now Rule VI, for the removal of judges) then a judge can only be removed from office for alleged violations of Canons of Judicial Ethics by that well defined, precise and exclusive procedure. He cannot be removed as a *judge* for alleged violations of *judicial* ethics pursuant to rules for disciplining *attorneys*. (Notably, the Cincinnati Bar Association could find no authority other than the *Franko* case, the inapplicability of which has previously been discussed and reference is respectfully made to pp. 35-43 of the Petition for the appropriate authorities.)

At page 16 of its brief, the Cincinnati Bar Association states:

> "The reason that the affidavits [denying the knowledge by Heitzler of the use of his name by Harmony Loan Company] are uncontradicted is that respondent at no time had the opportunity to contradict them."

This is *not true*.

The affidavits referred to appear in Petitioner's Appendix at pp. A-98 and A-99. They were filed along

with the Motion to Quash filed October 17, 1972 (Appendix, p. A-74-105). Oral argument before the Ohio Supreme Court was held on November 15, 1972, a month later, and the decision was rendered December 15, 1972. No motion to strike was filed by the Bar Association. No counter affidavits or exhibits, or any form of contradictory evidence was offered by the Bar Association. (Yet they had almost two months to attack them, if they desired, between the time they were filed and the time of the decision of the Ohio Supreme Court.)

The affidavits became part of the record when filed with the Motion to Quash. The Supreme Court of Ohio considered the affidavits and with no comment concerning their propriety denied the Motion to Quash. (Appendix, p. A-134). The only conclusion to be drawn is that the uncontradicted affidavits denying prior use of Judge Heitzler's name are true.

The Bar Association's anemic objection is untimely, unmeritorious, and utterly inappropriate.

At page 20 of the brief of the Cincinnati Bar Association a blatant and serious misstatement appears. It reads:

> "Mr. Spampinato hit the nail on the head, T. 719, when he said it was an honor to have these dignitaries like Judge Heitzler on the Board. *It was good advertising as well as being an honor.*" (Emphasis added.)

The actual transcript at T-719 makes *no reference whatsoever to advertising.* In response to the question

inquiring why four more or less inactive members were on the Board of Directors of Harmony Loan, Mr. Spampinato stated:

> "Because we needed a nice Board of Directors and I think it was an honor for us to have such dignitaries like these people as we had as directors."

Counsel for the Bar Association has read into the evidence an unwarranted distortion and added the statement about advertising. This is crucial because it not only casts grave doubt on the entire argument set forth in the Bar Association brief, but as appears below, misstatements and the innuendoes are repeated again. Furthermore, part of the case against Petitioner dealt with whether or not he permitted the power of his office or the influence of his name to assist the business of another. Petitioner has contended all along the charges were unwarranted. See the argument in the Petition, pp. 53-60.

At page 22 of the brief filed by the Cincinnati Bar Association, Judge Heitzler is accused of being under the influence of "cronyism," and in the paragraph preceeding this accusation it is stated:

> "Mr. Crisci [Chief Referee in the Domestic Relations Court] and Mr. and Mrs. Stone [an attorney who has appeared before Judge Heitzler] accompanied Judge Heitzler to Majorca. They were in the same 'group.'"

Respondent seems to have forgotten that the Majorca trip was sponsored by the Ohio State Bar Association.

T-18. Petitioner is now apparently being condemned for "cronyism" because he went on a Bar Association sponsored trip to Spain at which many other lawyers and wives were present.

At page 23, the Cincinnati Bar Association again misstates the evidence. Heitzler testified that he ate both at the Hangar Restaurant *and* at Wong's Chinese Restaurant. T-35,36. The regular luncheons at the Hangar lasted "approximately a *year*," not a year and a half as the Bar Association contends. T-36. Included in the luncheon group were *not only* Dr. Stone, *but also* Judge Mathews, Judge Chase Davies, Police Chief Schott, Mr. Peter Donohue from Heitzler's own office and Mr. Crisci and Mr. Swallow — again the Bar Association has misstated the evidence.

Furthermore, the Bar Association then sets out a text book example of a "non-sequitur". Because Dr. Stone was a friend of Heitzler (T-1201) then this intimacy and friendship supposedly led a bartender in a cafe (The Side Door - not the Hangar or Wong's) to allegedly recommend that Matlock hire Dr. Stone because he could get somewhere with Heitzler. T-180-187. The conclusion does not follow from the evidence.

Not only is the conclusion unsubstantiated by the evidence, but the only reference to "get[ting] someplace with Judge Heitzler" appears at T-187 and does *not* refer to "get[ting] someplace with Judge Heitzler" at all, but refers instead to "moving" the case faster than it had been previously. T-187. *Judge Heitzler's name is not even mentioned there.* Also, it is cru-

cial to note that the reasons why Dr. Stone allegedly could "move" a divorce case faster than Matlock's then counsel were objected to as hearsay and said objections were properly sustained. T-187-193. Petitioner submits that counsel for the Respondent has now gone beyond the very record itself into evidence which was objected to and which objections were sustained and in his very brief to this Honorable Court attempts to infer that Dr. Stone could influence Petitioner - an unwarranted and serious innuendo. The certified transcript of the Hearing testimony was sent to this Honorable Court and reference is respectfully made to T-180-190 for the full account of this highly inappropriate and unfounded argument by Respondent.

At page 27 of its brief, the Cincinnati Bar Association cites the testimony of Arthur J. Schuh, the collection attorney for Harmony Loan. T-337. Recall the Bar Association has charged, and the Ohio Supreme Court has found Heitzler guilty of lending the power of his office or the influence of his name to promote the business of Harmony Loan. Yet when the attorney who performed the collection work for Harmony Loan was asked:

> "Q What persons, to your knowledge, as of 1966 had any association with Harmony Loan?"

the following answer was given,

> "A The only one I knew that had any actual connection with them was Mr. Spampinato." (T-339).

Further Schuh testified at T-340:

> "Q . . . : at any time during your representation of the Harmony Loan Company were you ever aware that Judge Heitzler was a Director of that Company?"
>
> "A No, I was never told this."

The above quoted testimony (appearing as quoted and *not* at T-344 as the Bar Association states) utterly destroys the charge that Heitzler was allowing the power of his name or the influence of his office to aid the business of another. If the lawyer who handled the collections for Harmony Loan did not know Heitzler was connected with it, then it is impossible for Heitzler to have loaned the power of his office or the influence of his name to promote the business of Harmony. Hence no evidence existed upon which to base this finding of guilt.

At page 31 of its brief, the Cincinnati Bar Association makes the following flagrant misstatement concerning the record in this case:

> "It is the height of impertinence on the part of petitioner's counsel to seek to make part of the record in this case by a *motion to quash* filed in the Supreme Court of Ohio the affidavit of Rufus 'Snowshoe' Smith as to why he took the Fifth Amendment[1] when called to testify at the hearing before the panel and the affidavit of his alleged attorney as to why Rufus 'Snowshoe' Smith took the Fifth Amendment." (Emphasis added.)

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[1]Rufus Smith also denied any complicity in an alleged bribery incident that was the subject of testimony during the hearings. See Appendix, pp. A-116, 117.

First, the record clearly shows that the affidavits were filed as a part of Petitioner's *Objections to The Findings of Fact and Not the Motion to Quash.* Appendix, pp. A-116 - A-118 and 106 to 119.

Second, the Objections were filed on October 20, 1972 and oral argument was held approximately a month later on November 15, 1972. No motion to strike was ever filed. The only logical conclusion is that these affidavits, now of record, are true. Respondent's objection thereto is untimely and unmeritorious.

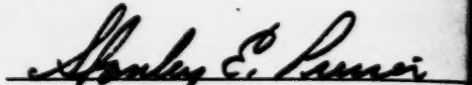
At page 32 of its brief, the Cincinnati Bar Association states that Rufus Smith "was hired for political reasons." The evidence supposedly supporting such statement appears on page 34 of the brief where witness Henry's testimony is quoted. Henry did not say Rufus Smith *was* hired for political reasons. He did say "I assumed that he was there for political reasons and that they were good and sufficient." However, the next quoted paragraph of Henry's testimony shows why Smith was hired and we quote from Respondent's brief, page 34:

> "Mr. Henry: Thank you. That is what I understand the whole thing to be. 'If you don't want another riot, Baby, get me a job.'"

It is well remembered in the Cincinnati community that racial riots occurred there some few years ago. It is also well known that Judge Heitzler helped quell such disturbances. If Rufus Smith was hired to prevent riots in "the colored community" then Judge Heitzler should

be lauded for his good judgment rather than criticized. Once again the Cincinnati Bar Association has failed to consider all the evidence.

For all the reasons set forth in the Petition, and those set forth in this Reply Memorandum, Certiorari should be granted.



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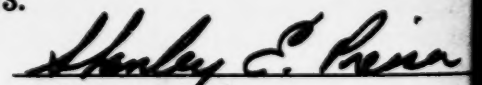
Counsel for Petitioner

May 4, 1973.

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petitioner's Reply Memorandum upon R. O. Klausmeyer, Esquire 2900 DuBois Tower, Cincinnati, Ohio 45202; John J. Getgey, Esquire, 615 Provident Tower, Cincinnati, Ohio 45202 and upon C. Donald Heile, Esquire, 3005 Carew Tower, Cincinnati, Ohio 45202, Counsel for the Cincinnati Bar Association, by depositing same in the United States mail, postage prepaid by air mail, this 4th day of May, 1973.



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Of Counsel for Petitioner